80-1593

Office-Supreme Court, U.S.
FILED
MAR 18 1981
ALEXANDER L. STEVAS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No.

STUART LEE KURLAND,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

Petition For A Writ Of Certiorari
To The Supreme
Court Of The State Of California

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Question Presented

By holding that, as a matter of law, in determining the sufficiency of a search warrant affidavit, a confidential informant's criminal record and police history are material only if they provide "extraordinary indication" of unreliability, has the Supreme Court of the State of California impermissibly diluted a magistrate's constitutional inference-drawing function, thereby violating the dictates of the Fourth Amendment and this Court's holdings in United States v. Harris, 403 U.S. 573 (1971), Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964) and Johnson v. United States, 333 U.S. 10 (1948).

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The Petitioner, STUART LEE KURLAND, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of California rendered on October 30, 1980. A Petition for Rehearing was filed on November 12, 1980, and denied on December 17, 1980.

Opinions Below

The opinion of the Supreme Court, reported in 28 Cal. 3d 376, appears at Appendix A, infra, pages 28 - 89 . The opinion of the Court of Appeal (5 Crim. No. 2890, April 19, 1979) appears at Appendix B, infra, pages 90 - 105; a Modification of Opinion on Denial of Rehearing (5 Crim. No. 2890, May 16, 1979) appears at Appendix C, infra, pages 106 - 109.

There is no written opinion by the

trial court, the Superior Court of Stanislaus County, but the substance of that court's ruling was to grant Petitioner's motion to suppress evidence and to dismiss the action, whereupon the plaintiff and appellant below, the People of the State of California, filed a notice of appeal on August 13, 1976.

Jurisdiction

The judgment of the Supreme Court was entered on October 30, 1980. See Appendix D, infra, page 110. A Petition for Rehearing was filed on November 12, 1980, whereupon said Court made an order, filed on November 26, 1980, extending the time for granting or denying the petition. See Appendix E, infra, page 112. On December 17, 1980, the Petition for Rehearing was denied. See Appendix F, infra, page 113. This Petition for Writ of

Certiorari is being filed within 90 days of the last mentioned date.

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1257(3).

Question Presented

By holding that, as a matter of law, in determining the sufficiency of a search warrant affidavit, a confidential informant's criminal record and police history are material only if they provide "extraordinary indication" of unreliability, has the Supreme Court of the State of California impermissibly diluted a magistrate's constitutional inference-drawing function, thereby violating the dictates of the Fourth Amendment and this Court's holdings in United States v. Harris, 403 U.S. 573 (1971), Spinelli v. United States, 393 U.S. 410 (1969);

Aguilar v. Texas, 378 U.S. 108 (1964) and Johnson v. United States, 333 U.S. 10 (1948).

Constitutional Provision Involved

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement Of The Case

On April 6, 1976, pursuant to a search warrant based on the hearsay declarations of a confidential informant, various contraband was seized and Petitioner was arrested and later held to

answer for violations of California Health and Safety Code Sections 11350 (possession of cocaine) and 11359 (possession of marijuana for sale). (CT[1] 93.) Thereafter, an information was filed (CT 1) and Petitioner pleaded not guilty to both counts charged. (CT 2.)

Petitioner then moved to suppress the evidence on the grounds that the search was unreasonable because the affidavit in support of the warrant contained false and incomplete information. (CT 111-112.) The suppression hearing was before the same judge who had issued the search warrant and extended over parts of several days, during which Petitioner concentrated on revealing, through an examination of the police

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1 This reference is to the Clerk's Transcript, part of the record before the Court of Appeal.

officer/affiant, the various facts which were omitted from the search warrant affidavit regarding the criminal record and police history, and hence the credibility and reliability, of the confidential informant, whose identity was strenuously guarded and withheld. Throughout these proceedings, Petitioner repeatedly invoked his state and federal constitutional rights by relying upon a number of California cases recognizing these dual constitutional safeguards against an unreasonable search and seizure; e.g.'s Parsley v. Superior Court, 9 Cal. 3d 934 (1973) (RT[2] 7); Theodor v. Superior Court, 8 Cal. 3d 77 (1972). (RT 8.)[3]

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2 This reference is to the Reporter's Transcript of the above-mentioned proceedings, part of the record before the Court of Appeal.

3 Petitioner continued to rely upon these

Petitioner successfully revealed some details regarding the confidential informant's criminal past, including a recent conviction of a felony involving dishonesty for which the informant was still on probation, and the motion to suppress the evidence was ultimately granted on the ground that "material information was not disclosed to the Court in the Affidavit [in support of the search warrant] which might have caused the Court [in its function as the issuing magistrate] to conclude differently in respect to the credibility of the confidential informant." (RT 113.) The case was then dismissed (CT 145) and the prosecution filed a notice of appeal. (CT 146-147.)

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3 cont.

dual constitutional rights throughout the subsequent proceedings, up to and including the appeal before the California Supreme Court.

The Court of Appeal reversed the trial court's order suppressing the evidence and dismissing the action, and remanded the case "with directions to add the omitted facts to the affidavit, test probable cause in the light of the additional information and enter an appropriate order thereon." Appendix B, infra, page 105.

The Court of Appeal held as follows regarding the materiality of the affidavit's factual omissions:

> "The trial judge, who was also the judge who issued the warrant, expressly found . . . that the omission of the recited information from the affidavit did result in unduly and substantially interfering with the judge's inference-drawing process. The trial court determination that material information was omitted constitutes a resolution of a factual question which is binding upon the appellate court.
>
> . . .
>
> We cannot say that as a

> matter of law the inference-drawing process was not interfered with by the omission of the facts which have been heretofore set forth." Id., pages 97-98.

The Supreme Court also reversed the order suppressing evidence and the judgment of dismissal, and remanded the case "for further hearings solely on the issue whether facts were excluded from the affidavit recklessly or with the specific intent of misleading the magistrate." Appendix A, infra, page 72.

In reaching the conclusion that the search warrant affidavit was not "substantially misleading," the Supreme Court offered the following definitions:

> "facts are 'material' and hence must be disclosed if their omission would make the affidavit substantially misleading. On review . . . [of the sufficiency of the affidavit] facts must be deemed material for this purpose if, because of their

> inherent probative force, there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination." Id., page 41. (Emphasis in original.)

Expressly recognizing that in the case at bar the trial court did determine that the confidential informant's criminal record and police history were material within the above definition, Id., page 60, while also affirming that a trial court's findings of fact in a suppression hearing should be upheld if substantially supported, the Court nevertheless rejected the findings and held, in a discreet footnote:

> "Materiality, however, is a question of law on which an appellate court may exercise independent judgment." Id., page 60, fn. 10.

Seeking to bolster, or reconcile, its position, the Court then embarked on a lengthy dissertation that establishes

a presumption of unreliability making it unnecessary, as a matter of law, for the issuing magistrate to concern himself with a confidential informant's criminal record and police history:

> "We therefore, conclude that, in most cases, the issue of possible unreliability is adequately presented to the magistrate when the affidavit reveals that the affiant's source of information is not a 'citizen-informant' but a garden-variety police tipster. In such circumstances, predictable details of the informer's criminal past will usually be cumulative and therefore immaterial." Id., page 66.

Applying these rules to the case at bar, the Court then held that since the affidavit made it clear that the confidential informant was not a "citizen-informant," the magistrate was already alerted to draw adverse conclusions about his reliability. Therefore, the omitted

details about the informant's criminal past, including the recent prior conviction of a felony involving dishonesty, which the trial court found capable of altering his own initial probable cause determination, provided no "extraordinary indication" of unreliability and were found, as a matter of law, to be immaterial. Id., page 67. By way of further explanation, the Court provided the following:

> "Our conclusion is not altered by the fact that the judge who issued the warrant also presided at the suppression hearing and found that the omitted information could have influenced his probable cause determination. We assume he meant that the new facts had given him pause about the correctness of his original decision. His candor and conscientiousness are commendable. However, as we have explained, materiality is a legal question. His declaration that particular facts could have influenced his probable cause analysis, though

indeed relevant, is not dispositive." Id., page 68, fn. 11.

Statement Of The Facts

The rather complicated factual situation is fairly summarized in the opinion of the Supreme Court, Appendix A, infra, pages 30-35.

Argument[4]

The Fundamental Protection Afforded By The Fourth Amendment Is Its Requirement That Warrants Only Issue Upon A

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4 We respectfully invite the Court's attention to the dissenting opinion of Chief Justice Bird, Appendix A, infra, pages 75-89, eloquently setting forth various arguments focusing on the majority's erroneous analysis and conclusions.

Finding Of Probable Cause By A Neutral And Detached Magistrate.

Probable cause is a deep-rooted Fourth Amendment concept which, coupled with that of reasonableness, provides a workable threshold standard:

> "'The requirement of probable cause has roots that are deep in our history.' [Citation.] Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest.' [Citation.] The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule. [Citation.]" Dunaway v. New York, 442 U.S. 200, 213 (1979).

The basic protection afforded by the Fourth Amendment is that the probable cause determination be made not by the police, but by a neutral and detached magistrate:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 13-14 (1948).

This provides the fundamental Fourth Amendment safeguard of a citizen's privacy:

> "The framers of the Constitution visualized the independent-judgment-by-a-neutral magistrate concept as the safeguard needed to protect the citizens of this nation from unfettered and unreasonable police searches of homes and other sanctuaries." Chapman v. United States, 365 U.S. 610,

614-615 (1961).

In Determining The Sufficiency Of A Search Warrant Affidavit Based Upon A Confidential Informant's Hearsay Statements, An Essential Part Of The Magistrate's Constitutional Function Is To Independently Evaluate The Credibility Of The Informant. And His Findings Are To Be Given Substantial Deference By A Reviewing Court.

To be legally sufficient to support the issuance of a search warrant, an affidavit relying on the hearsay statements of a confidential informant must meet two basic requirements, one of which is that it contain factual information allowing the magistrate to independently evaluate the credibility of the informant and the

reliability of his information. Aguilar v. Texas, 378 U.S. 108, 114 (1964); see Spinelli v. United States, 393 U.S. 410, 413 (1969).

Although reviewing courts may consider the sufficiency of a search warrant affidavit, the magistrate's probable-cause findings must be given substantial deference. Spinelli v. United States, supra, at page 419; Aguilar v. Texas, supra, at p. 111; Jones v. United States, 362 U.S. 257, at pages 270-271 (1960).

The Decision Of The Supreme Court Of California Dilutes The Magistrate's Constitutional Inference-Drawing Function By Precluding As A Matter Of Law, Disclosure And Consideration Of Facts That Bear Directly Upon And Closely Affect The Credibility Of The Confidential

Informant.

As previously discussed (supra, pages 10-14), the Supreme Court's decision contains various rulings affecting Fourth Amendment rights. These include and can be listed as three separate propositions: (1) the materiality of facts regarding the credibility of a confidential informant is a question of law subject to the independent judgment of reviewing courts; (2) details regarding the criminal record and police history of a confidential informant are material to an evaluation of his credibility only if they can provide an "extraordinary indication" of the unreliability of his information; and (3) a two-year old conviction of a felony involving dishonesty (receiving stolen property), obtained through the efforts of the officer/affiant, for which the confidential informant was

still on probation at the time he provided the information, see Appendix A, infra, page 67, is not material to the magistrate's credibility evaluation, even though the magistrate himself declared that this information did, in fact, lead him to doubt the credibility of the informant and, hence, the constitutional validity of the search warrant he issued.

The decision thus isolates one specific element of the fundamental probable-cause determination, the materiality of the facts from which inferences regarding credibility are to be drawn, and holds that this is now a question of law as to which reviewing courts have exclusive discretion. This goes beyond the reviewing courts' mandate to review the sufficiency of a search warrant affidavit and directly contradicts this Court's constitutionally derived pronouncements that substantial

deference be accorded to the magistrate's probable-cause determination. Spinelli v. United States, supra, at page 419; Aguilar v. Texas, supra, at page 111; Jones v. United States, supra, at pages 270-271. The decision further dilutes the magistrate's inference-drawing function, which is the fundamental Fourth Amendment safeguard against unreasonable searches and seizures, Chapman v. United States, supra, Johnson v. United States, supra, by isolating and precluding the disclosure and consideration of specific facts affecting the credibility of a confidential informant.

The significance of the type of facts that the decision precludes from being disclosed to and considered by a magistrate, and which are deemed "not necessarily important to the fair portrayal of an undercover informant's reliability in a

warrant affidavit," Appendix A, infra, page 69, were the focus of a recent opinion by Justice Richardson, who concurred with the majority in the case at bar. People v. Spearman, 25 Cal.3d 107 (1979), held that possession of heroin for sale was not an inherently dishonest felony for purposes of impeaching a witness at trial. In a spirited dissent, Justice Richardson stated:

> "Information about a witness' respect, or the lack thereof, for his civic responsibilities outside the courtroom, as demonstrated by a criminal conviction of this type, may aid a jury in determining how seriously the witness is taking his responsibilities under his oath inside the courtroom. This information, properly, may assist a jury in deciding what weight should be accorded his testimony. Certain kinds of crimes are inherently, and by their very nature, ones which speak eloquently of those committing them.
>
> I cannot join the majority in concealing from the jury, in its difficult search for the

> truth, information which bears directly upon, and so closely affects, the credibility of the witness. To deprive the jury of this knowledge is to permit the witness to assume . . . [a] false aura of veracity . . ." Id., at page 122.

It is difficult to understand how Justice Richardson can now join the majority in a decision that would conceal from a constitutionally mandated factfinder this very type of "information which bears directly upon, and so closely affects, the credibility of the witness," especially since the magistrate has an even more "difficult search for the truth" by not having the witness before him, or under oath, or subjected to cross-examination, or even subjected to having to disclose his identity. Surely the danger of a "false aura of veracity" is more pronounced in this latter situation.

The significance of the magistrate's

constitutional task of evaluating the credibility of a confidential informant, and the significance of the decision's infringement on this fundamental Fourth Amendment safeguard, is further elucidated in the dissenting opinion of Justice Harlan in United States v. Harris, 403 U.S. 573 (1971):

> ". . . the two elements necessary to establish the informer's trustworthiness-namely, that the tip relayed to the magistrate be both truthful and reliable--are analytically severable. It is not possible to argue that since certain information, if true, would be trustworthy, therefore, it must be true. The possibility remains that the information might have been fabricated. This is why our cases require that there be a reasonable basis for crediting the accuracy of the observation related in the tip. In short, the requirement that the magistrate independently assess the probable credibility of the informant does not vanish where the source of the tip indicates that, if true, it is trustworthy." Id., at page 592.

Justice Harlan's analysis focuses squarely upon the significance of the informant's credibility in the case at bar. Here we have a situation where although the search warrant affidavit sets forth a substantial number of detailed factual observations by the informant, the source of which, if true, would definitely be trustworthy, "the possibility remains that the information might have been fabricated." Indeed, in this case the magistrate himself implicitly recognized the strength of this possibility by declaring that he may have been misled by the omitted facts affecting the informant's credibility.

Conclusion

This is a case where the magistrate has stated that, based on all the facts made known to him before and after he

issued a search warrant, he may have been misled about the credibility of the confidential informant. Therefore, by necessary implication, the warrant may have issued without probable cause, in violation of the Fourth Amendment of the United States Constitution.

This is the substance of the case, though admittedly, not its form. The Supreme Court of the State of California dealt with it by finding that the magistrate's candid, conscientious and commendable conclusion "though indeed relevant, is not dispositive." Appendix A, infra, page 68, fn. 11. In essence, the Supreme Court held that materiality is a question of law which precludes consideration of the specific facts giving rise to the magistrate's doubts about the informant's credibility.

Petitioner's application for a Writ

of Certiorari to the Supreme Court of the State of California should be granted to determine whether the Supreme Court has impermissibly diluted a magistrate's constitutional function of determining if probable cause exists for the issuance of a search warrant.

DATED: March 13, 1981

Respectfully Submitted,

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APPENDIX A

PEOPLE v. KURLAND

Crim. 21023

Super. Ct. No. 137154

SUPREME COURT
FILED
OCT 30 1980
LAURENCE P. GILL, Clerk

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C O P Y

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Appellant, v. STUART LEE KURLAND, Defendant and Respondent.	)	Cr. 21023 Super. Ct. No. 137154

The People appeal an order suppressing evidence (Pen. Code, § 1538.5, subd. (a)) and a judgment dismissing a criminal information (id., § 995). The information charged defendant with possession of cocaine (Health & Saf. Code, § 11350) and of marijuana for sale (id. § 11359). We

SEE CONCURRING AND DISSENTING OPINIONS

inquire whether a search-warrant affidavit was deficient because it omitted information bearing on the credibility of an undisclosed informant. We conclude that the omissions asserted did not make the affidavit substantially misleading. Accordingly we reverse the judgment of dismissal and the order suppressing evidence.

On April 6, 1976, Officers Bell and Matt of the Modesto Police Department obtained a warrant to search Kurland's Discount Water Beds, a store owned by defendant, for cocaine, paraphernalia, and evidentiary documents. The search, carried out the same day, disclosed a "coke" spoon and vial of white powder in defendant's pocket. Defendant handed the searching officers a baggie of marijuana and some "zigzag" cigarette papers from "my" briefcase. Two other containers of marijuana and a .38-caliber pistol were found in his

office. The marijuana weighed a pound and a half; the white powder in the vial proved to be cocaine.

The warrant was principally supported by Matt's affidavit. It declared in substance that Z, a confidential informant proved reliable in two earlier narcotics cases, had told Matt he frequently and recently saw defendant, at the store, in possession of substantial quantities of described substances. Z believed and defendant had confirmed that these were cocaine and marijuana. Defendant had confided to Z his storage and sale of narcotics. He told Z he sometimes used "Steve's" house, behind his own, to keep contraband. Z had recently seen marijuana in Steven Mendes' residence behind defendant's home. Z also had recently seen a .38-caliber pistol on defendant's desk at the store. Defendant told Z he intended to kill, or

have killed, the next person who crossed him. Defendant had asked Z to kill someone who had "ripped him off" in a drug deal.

The affidavit recited Matt's confirmation that the addresses given by Z were occupied by defendant and Mendes. Matt also alleged he had seen defendant pick up a concealed-weapon permit application and had overheard defendant tell the clerk that it was for a .38-caliber pistol. A completed application was never submitted. According to the affidavit, Z's statements about use of "Steve's" residence to keep narcotics conformed to Matt's experience about the habits of drug dealers. The affidavit disclosed that Z was a former user of cocaine, was familiar with its packaging and use, was continuing to serve as a narcotics informant, and had never given false information. Finally the

affidavit told why Matt feared for Z's safety if his identity were disclosed.[1/]

At the suppression hearing, despite the People's repeated objections on grounds of protecting a confidential source, defense counsel examined Matt about his relation with Z. The answers revealed that Z had been convicted of a felony after Matt signed a 1974 complaint against him, that Z had been placed on probation, that Matt had a dozen contacts with Z in 1976, and that Matt and Z had discussed Z's cooperation as an informant. Matt also testified he did not know when he prepared the affi-

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1/ Z's information about recent narcotics activities at defendant's and Mendes' residences was substantially corroborated in a second affidavit, by Officer Ladd, which relief on X, another confidential informant. X's information about narcotics at the waterbed store, on the other hand, was too stale to buttress a warrant to search the store. (Cf. Alexander v. Superior Court (1973) 9 Cal. 3d 387, 393.)

davit whether Z's probation had been terminated or whether Z had violated probation. Matt denied that threats were made to Z to induce his cooperation against defendant. Questions about the nature of the offenses charged in 1974 and whether Matt was then the investigating officer were never answered in open court. Some additional details were revealed in in camera hearings convened by the court to resolve the People's confidential-source objections.

The court granted defendant's motion to suppress on the ground that "material information" was not disclosed in the affidavit which might have led the magistrate "to conclude differently in respect to the credibility of the confidential informant." The information was then dismissed.

The People say that the affidavit was not misleading and that the disputed infor-

mation was withheld properly and in good faith on grounds of privilege. Therefore we must decide what rules apply when defendant charges that a warrant affidavit, though sufficient on its fact, is incomplete.

1. May defendant show omission from the affidavit?

In California a facially valid search warrant affidavit may be attacked on grounds that it contains deliberate or negligent misstatements. The rule arises both from our Constitution's guarantee against unreasonable search and seizure and from statutes regarding suppression of illegally obtained evidence. (Cal. Const., art. 1, § 13; Pen. Code, §§ 1538.5-1540; People v. Cook (1978) 22 Cal.3d 67, 74; Theodor v. Superior Court (1972) 8 Cal.3d

77, 100-101.)[2/] It rests upon the constitutional preference for warrants, which presupposes that probable cause determinations will be made independently by neutral, fully informed judicial officers rather than by the police. A misinforming affidavit hinders the magistrate's inference-drawing powers and increases the likelihood that privacy will be invaded without probable cause. (Cook, supra, at pp. 81-82; see Aguilar v. Texas (1964) 378 U.S. 108,

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2/ Theodor, holding that negligent misstatements must be excused from an affidavit, mentioned both state and federal search and seizure clauses. (Cook, supra, 22 Cal.3d at p. 81, fn. 4.) Subsequently the United States Supreme Court concluded, contrary to Theodor, that the federal clause imposes no sanctions for negligent misstatements and compels mere excision of those that are intentional or reckless. (Franks v. Delaware (1978) 438 U.S. 154, 155-156.) Accordingly, when Cook determined that deliberate or reckless misstatements compel automatic quashing of the warrant Justice Mosk's opinion relied solely on California law (22 Cal.3d at p. 88), as we do here.

110-111; Johnson v. United States (1948) 333 U.S. 10, 13-14; Theodor, supra, 8 Cal. 3d at pp. 90-91, fn. 6, 96.)

This court in Theodor recognized that similar difficulties might arise when an affidavit simply fails "to include information which might otherwise negate a finding of probable cause." (8 Cal.3d at p. 96, fn. 11; see also Cook, supra, 22 Cal. 3d at p. 92.) The courts of appeal have consistently held that an affidavit may be insufficient when it omits facts adverse to the warrant application. (People v. Neusom (1977) 76 Cal.App.3d 534, 538-539; Morris v. Superior Court (1976) 57 Cal.App. 3d 521, 526; People v. Barger (1974) 40 Cal.App.3d 662, 668-669; see People v. Webb (1973) 36 Cal. App.3d 460, 470-471.)

Now directly faced with the issue, in general we endorse those holdings. An affidavit may be as inaccurate when it omits

facts as when it misstates them. The crucial, inference-drawing powers of the magistrate may be equally hindered in either case, with identical consequences for innocent privacy. (See Moyland, Hearsay and Probable Cause: An Aguilar and Spinelli Primer (1974) 25 Mercer L.Rev. 741, 749.) We therefore conclude that the California Constitution and statutes permit defendant to attack a facially sufficient warrant affidavit on grounds that, though it contains no affirmative falsehoods, it is incomplete.

2. What facts must affiant include?

Though similar for many purposes, omissions and misstatements analytically are distinct in important ways. Every falsehood makes an affidavit inaccurate, but not all omissions do so. An affidavit need not disclose every imaginable fact

however irrelevant. It need only furnish the magistrate with information, favorable and adverse, sufficient to permit a reasonable, common sense determination whether circumstances which justify a search are probably present. (See United States v. Harris (1971) 403 U.S. 573, 577-585; Spinelli v. United States (1969) 393 U.S. 410, 419; United States v. Ventresca (1965) 380 U.S. 102, 108; People v. Stout (1967) 66 Cal.2d 184, 192-193.)

Recognizing this, the courts of appeal seem consistently to have held that an affiant's duty of disclosure extends only to "material" or "relevant" adverse facts.[3/]

3/ Morris, which contains the lengthiest discussion of materiality, defined the term in several ways. Omitted facts were deemed material "to the extent that it can be said, fairly, that [by their omission] the magistrate's inference-drawing process was interfered with, substantially" (57 Cal.App.3d at p. 524, italics added), or if they "could have had an adverse effect on the normal inference-drawing process of

At the same time, they have applied the materiality requirement to reach only those omissions which significantly distorted the probable cause analysis. (See Neusom, supra, 76 Cal.App.3d at p. 541; Morris, supra, at p. 527; Barger, supra, 36 Cal.App.3d at p. 470.)[4/]

3/ cont.

the magistrate" (id., at p. 526, italics added) or "could have negated the magistrate's finding of probable cause" (id., at p. 5727, italics added) or "might" have caused the magistrate to find an informant "unreliable and his information untrustworthy. . . ." (Ibid.)

4/ In Neusom, for example, the fact that a police informant had not been skin-searched before making a narcotics "buy" was deemed "insignificant" when his reliability had otherwise been established by his prior accuracy and his admission of penal offenses. Webb held that when the informant's heavy narcotics use and purchases of narcotics from defendant were disclosed, "the magistrate does not need to see [the informant's extensive] rap sheet to know" that his credibility might be tainted by bad character and motives. (See discussion, infra.) On the other hand, police efforts to manufacture reliability in a suspected informant (Morris) and

We think the results reached by these decisions strike a proper balance among practicality, accuracy, and the policy of encouraging resort to the warrant process. (See Ventresca, supra, 380 U.S. at pp. 106, 108; People v. Keener (1961) 55 Cal.2d 714, 723.) We conclude, as courts of appeal effectively have concluded, that facts are "material" and hence must be disclosed if their omission would make the affidavit substantially misleading. On review under section 1538.5, facts must be deemed material for this purpose if, because of their inherent probative force, there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination.

The People urge that, even if officer

4/ cont.

failure to disclose that an informant had recanted (Barger) have been deemed material.

Matt intentionally omitted material facts, the warrant evidence should not be suppressed because the omissions were proper, or at least reasonable and in good faith. Defendant argues, on the other hand, that suppression is the proper remedy whenever material facts are intentionally or deliberately excluded. We must therefore decide what remedies apply when omissions from the affidavit are found.

3. What are the remedies for an incomplete affidavit?

Theodor recognized that all inaccuracy in the affidavit impedes the neutral determination of probable cause. However, it concluded, probability and not certainty is the relevant standard; and constitutional protections against unlawful search and seizure are subject to "the overriding principle of reasonableness . . . ."

Negligence by an affiant should be deterred, but reasonable attempts at accuracy should be accepted. (8 Cal.3d at pp. 96-97.) Thus, the court held, where affiant reasonably believed his statements the warrant should stand. When he was not reasonable in believing them, they should be excised and the remaining allegations retested for probable cause. (Id., at pp. 100-101.)

In Cook, we considered the appropriate sanction for reckless or knowing falsehoods. We explained why mere negligence calls for the "correct and retest" device, rather than quashing of the warrant. Negligent falsehood, we reasoned, does not undermine the magistrate's conclusion that affiant was generally credible. Hence the remaining statements in the affidavit may be presumed true and their sufficiency retested by a reviewing court under section 1538.5. But lying or reckless inaccuracy may render

the truthfulness of all statements in the affidavit suspect. The reviewing court independently cannot reassess the affiant's credibility, since that is a matter exclusively for the magistrate. It therefore lacks a "reliable factual basis" to determine probable cause. There remains in such cases no alternative but to quash the warrant. (22 Cal.3d at pp. 84-87.)

Cook expressly reaffirmed the "rule of reason," holding that the exclusionary doctrine developed in Theodor is intended, by deterring unlawful police conduct, to minimize the risk that innocent privacy will be invaded. Once unlawful conduct is shown, Cook explained, the scope of the exclusionary rule will depend on whether the inaccuracy was negligent, on the one hand, or reckless or deliberate on the other. But if the affidavit reflects a reasonable attempt at truth, constitution-

al principles are satisfied; and no purpose is served by vitiating the warrant, no matter how crucial the inaccuracy. (22 Cal.3d at pp. 82-88.) We adhere to that analysis here.

Theodor and Cook described misstatements as "reasonable," "negligent," and "intentional," applying the exclusionary rule accordingly. By analogy, the courts of appeal have held that material facts "negligently" omitted must be added to the affidavit by the reviewing court and the affidavit then retested for probable cause. "Intentional" omissions of material facts have been deemed to require an automatic quashing of the warrant. (Barger, supra, 40 Cal.App.3d 662, 669; Neusom, supra, 76 Cal.App.3d 534, 538-539; Morris, supra, 57 Cal.App.3d 521, 527-528.)

Defendant contends that, under Theodor and Cook, negligence is synonymous with in-

advertence and that every conscious omission of a material fact, no matter how reasonable or justified, should invoke the sanction of suppression. We disagree.

Both defendant and lower courts have failed to realize that the Theodor-Cook system of remedies may not be applied exactly to omissions. Unlike misstatements, omissions do not always render an affidavit inaccurate. As we have seen, only material omissions have that effect. Intentional omissions, unlike the intentional misstatements considered in Cook, are not necessarily an effort to mislead the magistrate. They may arise for a correct, or at least reasonable, conclusion that the omitted facts were immaterial or privileged.[5/] The

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5/ For example, the People here invoke their privilege to withhold from defendant the identity of a confidential source. It is well settled that defendant has no right to discover an informant's

procedures and remedies applicable to omissions must account for those crucial differences.

First, the reviewing court must determine whether any omissions asserted are material, as herein we have defined that term. Because an affidavit with no material omissions is substantially accurate and truthful; it corresponds for most purposes to an affidavit with no misstatements. Once all the asserted omissions have been deemed immaterial, the primary question is whether the affidavit on its face supports

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5/ cont.

identity solely to attack a facially valid search warrant affidavit. That right arises only where defendant shows a reasonable possibility that informant is a witness to guilt or innocence. (Evid. Code, § 1042, subds. (b), (d); Theodor, supra, 8 Cal.3d 77, 88; People v. Keener, supra, 55 Cal.2d 714, 723; see also McCray v. Illinois (1967) 386 U.S. 300, 310-314.) It follows that a warrant affidavit need not disclose details that reasonably would tend to reveal the informant's identity.

probable cause. If it does, the warrant usually must stand. (See, e.g., People v. Neusom, supra, 76 Cal.App.3d at p.541; People v. Webb, supra, 36 Cal.App.3d at p. 470; but see discussion, post.)

If an omission is found material, the reviewing court must next determine, as in Theodor and Cook, whether it arose innocently or from culpable conduct. However, since not all intentional omissions of material facts are blameworthy, the reviewing court must apply a modified version of the Theodor-Cook formula for culpability. The necessary modification is plain. The trial court must decide whether the material omission was either (1) reasonable, (2) negligent, or (3) recklessly inaccurate or intentionally misleading. That the omission itself was "intentional" rather than inadvertent may be relevant to those issues, but may not alone be dispositive.

A material omission is reasonable when despite the exercise of due care, affiant was ignorant of the omitted fact or forgot to include it, or his conclusion that it was privileged or immaterial was reasonable even if incorrect. Where material omissions are reasonable, whether volitional or inadvertent, no sanction should be imposed; the situation corresponds to that of reasonable misstatements. Because affiant will, in such cases, have done all that can reasonably be expected to comply with constitutional standards, little deterrent purpose would be served by further review of the affidavit. (Theodor, supra, at pp. 97-100.)

Negligent omissions of material fact occur when the affiant is unreasonably ignorant of facts, unreasonably forgets to include them, or makes a good faith but unreasonable decision that they need not or

should not be included. In such cases the "add and retest" formula developed in Barger, Morris, and Neusom is proper. It discourages carelessness and helps eliminate the likelihood that a negligent mistake may cause an erroneous finding of probable cause. Yet it recognizes the affiant's good faith effort at accuracy. (Cook, supra, 22 Cal.3d at pp. 84-85.)

The dissent here suggests that any intentional material omission should automatically vitiate the warrant. As with intentional misstatements, it argues, deliberate omission of a material fact undermines the magistrate's implicit finding that the affiant was credible and deprives the reviewing court of a "reliable factual basis" to redetermine probable cause. (See Cook, at pp. 86-87.) We disagree.

An intentional omission is not necessarily culpable. Moreover, an omission can

be both intentional and negligent at the same time. Thus an intentional omission, even where material, should not automatically invoke Cook's "suspect-credibility" reasoning, though a deliberate lie properly does. Something more than mere intent to omit is required to justify the conclusion that statements that do appear in the affidavit may not be trusted.[6/]

The dissenting opinion here suggests that a reviewing court may not assume the magistrate would have found probable cause

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6/ The dissent carries the argument even further, suggesting that a material omission about the informant completely undermines his credibility and that the facts he has provided to support probable cause must therefore be rejected. However, statements about the informant's reliability are simply part of the probable cause showing that a reviewing court must accept as true if presented by a credible affiant. (Cook, at pp. 84-85.) The court may simply add the fact omitted and decide whether the corrected, presumably truthful affidavit establishes the informant's reliability.

had he known of the negligent omission. Hence, the dissent reasons, an affidavit materially incomplete because of affiant's negligence may never support a decision to uphold the warrant. That view contravenes both Theodor and Cook.

Every negligent inaccuracy, whether misstatement or substantial omission, might have induced a fully informed magistrate to find probable cause lacking. Yet nothing in our recent cases suggests that the court therefore must quash the warrant. On the contrary, the reviewing court simply eliminates the negligent inaccuracy, assumes the affidavit to be otherwise truthful, and determines independently whether, as corrected, the affidavit is "sufficient, under settled standards, to [establish] probable cause . . . ." (Theodor, supra, 8 Cal.3d at p. 101, fn. 14; Cook, supra, 22 Cal.3d at pp. 84-85.)

That "rule of reason" assumes, as does the dissent, that the reviewing court may not second-guess the magistrate. (Cook, supra, at p. 85.) However, it also recognizes that we do not minimize unreasonable invasions of privacy by rejecting, on review, the entire showing of a credible affiant because negligently he or she was inaccurate in one respect. (Ibid.) Moreover, it encourages the affiant to inform the magistrate fully by extending the duty of disclosure in the affidavit beyond those facts that necessarily would preclude a finding of probable cause.[7/]

7/ Neither Theodor nor Cook faced the question whether a "material" misstatement invariably vitiates the warrant. As we have seen, it is unnecessary to find a falsehood material in order to find the affidavit inaccurate. The importance of the falsehood becomes pertinent only when the affidavit is retested for probable cause. Theodor and Cook do not use the term "material" in that context. Omissions present a more complex problem in which the

The dissent urges that an "add and retest" remedy for negligent omissions is an insufficient sanction to deter improper police conduct. Such a view ignores the express holding of Theodor, so recently confirmed in Cook, that negligent inaccuracy calls only for correction and retesting. (Theodor, at pp. 100-101; Cook, at pp. 82-85.)

Indeed, the rule espoused would frustrate rather than promote the deterrent

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7/ cont.

importance of the omitted fact must be considered at the outset to determine whether the affidavit is inaccurate. This threshold test we have defined in terms of materiality. The importance of the omission must then be assessed again when, as in Theodor, the affidavit is corrected and retested.

While Theodor and Cook do not apply that two-step analysis they do not preclude it. Every negligent misstatement in an affidavit necessarily involves a fact that affiant, at least, deemed important to the probable cause analysis. But not all such misstatements vitiate the warrant.

goals of those decision. It would contravene the principle of reasonable accuracy, under which mistakes occurring despite the exercise of due care are not punished, however crucial. (Theodor, at pp. 97-101; Cook, at p. 82.) And because it would not leave a sterner sanction for deliberate attempts to mislead the magistrate (see discussion, post), the police would have nothing to lose by sliding from mere carelessness into recklessness and treachery.

When an abuse of that gravity appears--when affiant intentionally omits any fact for the purpose of deceiving the magistrate or recklessly disregards the accuracy and completeness of the affidavit--Cook's analysis fully applies. An omission of that kind is no different from a reckless falsehood or a deliberate lie. Any such attempt to mislead the magistrate undermines the judicial process, makes the

entire affidavit suspect, and calls for harsh deterrence. The appropriate response is to quash the warrant regardless of whether the omission ultimately is deemed material.

The burden on the issues of materiality, privilege, and affiant's culpability is to be allocated as in the case of misstatements. If the defense states "with some specificity" its reasons for believing that material facts were omitted, it may try to show such omissions and their materiality. The obligation of showing that material omissions were proper or reasonable rests with the People, but defendant has the burden of demonstrating recklessness or intent to mislead. (See Cook, supra, 22 Cal.3d at pp. 89-92; Theodor, supra, at p. 102.)

We are aware of Cook's holding that defendant need not show bad faith or

ulterior motive to quash a warrant for deliberate falsehood, since "[t]hat would indeed be a difficult burden to sustain . . . ." (22 Cal.3d at p. 91.) But Cook also reasoned that such a showing was "of little if any relevance: once the defendant has shown the affiant knowingly lied under oath in any respect, the remainder of his allegations become suspect regardless of what his ulterior motives may have been. . . ." (Ibid., italics added.)

In other words, perjury is sufficient evidence of lack of credibility; and proof of an ulterior motive for the lie is redundant. But intentional omissions do not necessarily have the same effect. There must be something more that gives an intentional omission the culpable quality of perjury. An intent to mislead supplies the element of purposeful deception already implicit in lying.

Demonstrating purposeful deception may be a difficult burden, but we do not think it is an insurmountable one. "It may be evidenced by the affirmative statement or admission" of affiant. "If he is silent or [denies a purpose to mislead]" it may be shown indirectly. (Id., at p. 90.) For example, if affiant denies knowledge of omitted facts his protestations may be overcome by the testimony of those present when he learned them. If he says he did not disclose the facts because he thought they were privileged or immaterial, the evidence may permit an inference that no such belief could have arisen in good faith. The more unreasonable the circumstances surrounding an omission, the more compelling the inference of recklessness or intentional deception.[8/]

8/ Morris, supra, shows that inten-

If defendant can show why the affiant sought to deceive--his ulterior motive--he certainly may do so to bolster his circumstantial case. Yet such an inquiry often will be unnecessary under the standard we adopt.

All issues necessary to determine the warrant's validity are to be resolved in the first instance by the trial court at the suppression hearing.[9] Here the court did not make the necessary determinations.

8/ cont.

tional deception indeed may be provable in a particular case. There an affiant concealed efforts to manufacture reliability in an informant he himself suspected. (57 Cal.App. 3d at p. 532.)

9/ In assessing the reasonableness of a material omission courts should, of course, bear in mind the purposes of warrant affidavits and the practical conditions under which they are usually prepared. (Spinelli v. United States, supra, 393 U.S. 410, 419; United States v. Ventresca, supra, 380 U.S. 102, 108; People v. Keener, supra, 55 Cal.2d 714, 723; and see discussion, ante, pp. 6-7.)

It suppressed the warrant evidence simply on grounds that the omissions were material and volitional. Issues of privilege, negligence, recklessness, and intentional deception never were resolved. On that ground alone, the suppression order and the consequent judgment of dismissal must be reversed.

4. Were the omissions material?

The trial court apparently believed that the details of an anonymous informant's criminal record and police history are necessary to avoid a misleading impression of the informant's reliability and credibility. Under the circumstances of this case, we disagree.[10/]

10/ On review of a suppression hearing the trial court's findings of fact must be upheld if substantially supported. (People v. Superior Court (Keithley) (1975) 13 Cal.3d 406, 410.) Materiality, however, is

Long settled law already creates a strong inference that information from police contacts is to be viewed with extreme caution. An affidavit which relies on information from a tipster must set forth underlying facts justifying the conclusion that the source is reliable or the information itself credible. (Aguilar v. Texas, supra, 378 U.S. 108, 114; Alexander v. Superior Court, supra, 9 Cal.3d 387, 393.) An affiant's conclusory opinions of reliability or credibility are not enough, and mere quantity and detail in the tipster's statements do not render them worthy of belief. (People v. Scoma (1969) 71 Cal.2d 332, 340.) Reliability must be

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10/ cont.

a question of law on which an appellate court may exercise independent judgment. Implicit in our definition of materiality (ante, pp. 8-9) is the assumption that the omitted information might reasonably have altered the magistrate's decision.

shown independently, as by corroboration of the information received (Spinelli v. United States, supra, 393 U.S. 410, 417-418; Alexander, supra, at p. 395), the informant's previous record of accuracy in similar situations (Jones v. United States (1960) 362 U.S. 257, 270-271), or indications that the informant has spoken against penal interest. (United States v. Harris, supra, 403 U.S. 573, 583.) If the affidavit includes insufficient details to permit a reasonable belief in probable accuracy, it fails to demonstrate probable cause as a matter of law.

The rule that the affiant must demonstrate a tipster's probable reliability or credibility arises not only from the usual distrust of hearsay evidence but also from an assumption that information provided by customary police sources is inherently suspect. Accordingly, the rule

does not apply to information from disinterested citizens who accidentally observe crime and report it forthrightly as a civic duty. "Citizen informants," once identified as such, are presumptively reliable. (E.g., People v. Smith (1976) 17 Cal.3d 845, 850-851; People v. Ramey (1976) 16 Cal.3d 263, 269, and fn. 4; People v. Hill (1974) 12 Cal.3d 731, 761, disapproved on other grounds, People v. DeVaughn (1977) 18 Cal.3d 889, 896; Krauss v. Superior Court (1971) 5 Cal.3d 418, 421-422, disapproved on other grounds, Cook, supra, at pp. 98-99; People v. Guidry (1968) 262 Cal.App.2d 495, 497-498; People v. Lewis (1966) 240 Cal.App.2d 546, 549-550.)

In Smith the court explained that distinction by quoting this succinct statement in People v. Schulle (1975) 51 Cal.App. 3d 809, 814-815: "A 'citizen-informant' is distinguished from a mere informer who

gives a tip to law enforcement officers that a person is engaged in the course of criminal conduct. [Citations.] Thus, experienced stool pigeons or persons criminally involved or disposed are not regarded as 'citizen-informants' because they are generally motivated by something other than good citizenship. [Citations.]" (Smith, supra, at pp. 850-851; italics added.)

Such persons frequently have criminal records and a history of contact with the police. Often they are free only on probation or parole or are themselves the focus of pending criminal charges or investigations. All familiar with law enforcement know that the tips they provide may reflect their volnerability to police pressure or may involve revenge, braggadocio, self-exculpation, or the hope of compensation. (See United States v. Harris, supra,

403 U.S. 573, 599 [dis. opn. of Harlan, J.]; United States v. Gonzalez (5th Cir. 1974) 491 F.2d 1202, 1207-1208; United States v. Unger (7th Cir. 1972) 469 F.2d 1283, 1287, cert. den. (1973) 411 U.S. 920; United States v. Kinnard (D.C. Cir. 1972) 465 F.2d 566, 570; People v. Hambarian (1973) 31 Cal. App.3d 643, 655; People v. Cheatham (1971) 21 Cal.App.3d 675, 677, fn. 2; Moylan, supra, 25 Mercer L.Rev. at pp. 769-779.) The details of their criminal pasts are not necessary to place the magistrate on notice of their potential unreliability. (People v. Webb, supra, 36 Cal.App.3d 460, 470.)

Both an issuing magistrate and a reviewing court must initially assume that information from such sources is unreliable for purposes of probable cause. Such a rule alerts the magistrate to the very danger defendant urges--that the statements

of tipsters from "criminal society" may receive unwarranted weight.

We therefore conclude that, in most cases, the issue of possible unreliability is adequately presented to the magistrate when the affidavit reveals that the affiant's source of information is not a "citizen-informant" but a garden-variety police tipster. In such circumstances, predictable details of the informer's criminal past will usually be cumulative and therefore immaterial.

Here, Matt's affidavit made clear that Z was not a citizen-informant. It recited that Z had supplied narcotics information in the past, was himself a former user of hard drugs, and was continuing to operate as a confidential police source. It detailed his association not only with defendant but with Steven Mendes, who the informant believed was also involved in narcot-

ics. Thus Z was clearly identified as a more-or-less-regular police agent, useful for his drug connections; and the magistrate was alerted to draw adverse conclusions about Z's reliability.

The details of Z's past revealed at the open suppression hearing would have added little to the magistrate's deliberations. Essentially they showed that Matt's efforts had contributed to Z's felony conviction, that Z was on probation, and that Z and Matt had discussed Z's cooperation as an informant. Even if those facts might support an inference of Z's dishonesty or vulnerability to police pressure, that inference was already inherent in Z's status as a confidential tipster. The omitted details provided no extraordinary indication that Z's information in this particular case was unreliable.[11/]

11/ In both in camera hearings con-

Defendant argues in particular that Z's 1974 felony conviction for receiving stolen property was necessarily material since it demonstrates a specific predisposition to dishonesty. (Pen. Code, § 496 [guilty knowledge is element of offense];

11/ cont.

vened by the trial court to resolve Matt's invocation of the informant-nondisclosure privilege, Z's police history was examined at greater length. We have studied the sealed transcript of those hearings, and no facts emerge suggesting more than the usual possibilities of lies or mistakes.

Our conclusion is not altered by the fact that the judge who issued the warrant also presided at the suppression hearing and found that the omitted information could have influenced his original probable cause determination. We assume he meant that the new facts had given him pause about the correctness of his original decision. His candor and conscientiousness are commendable. However, as we have explained, materiality is a legal question. His declaration that particular facts could have influenced his probable cause analysis, though indeed relevant, is not dispositive.

cf., People v. Spearman (1979) 25 Cal.3d 107, 114.) We disagree. As we have said, the magistrate must assume, subject to rebuttal in the affidavit, that a police informant may be unreliable. Thus, evidence of general dishonesty which might be admissible at trial to impeach an otherwise convincing witness is not necessarily important to the fair portrayal of an undercover informant's reliability in a warrant affidavit.

We caution that when the affiant knows or should know of specific facts which bear adversely on the informant's probable accuracy in the particular case, those facts must be disclosed. For example, if police have actually threatened or coerced the informant, or the informant bears a grudge against the defendant or is seeking to avoid or mitigate personal difficulties with the authorities, con-

crete evidence on those issues is material for purposes of the affidavit. In addition, if the informant's statements are substantially contradicted by independent police investigation, or if the affiant knows or should know of other specific circumstances which do or should lead him to suspect the informant's current credibility, the affidavit must say so.

Similarly when the affidavit makes specific affirmative disclosures for purposes of buttressing the informer's general reliability, it must also include the equally specific adverse information necessary to prevent misrepresentation. For example, if the affidavit states that the informant has proved reliable in previous investigation it must also set forth similar instances of prior unreliability. (See Moylan, supra, 25 Mercer L.Rev. at p.

759.)[12/]

As we have explained, the suppression hearing in this case revealed no specific indicia of inaccuracy; and the affidavit set forth general facts sufficient to invoke the suspicion and scrutiny appropriate

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12/ The guidelines are limited, of course, by the confidential informant privilege. When the affiant reasonably concludes that otherwise necessary details would tend to disclose the identity of an informant, he must nonetheless include as much detail as practicable and must at least state generally that specific grounds for suspicion exist. An affidavit which meets those requirements and gives substantial grounds for crediting the informant is legally sufficient to support a decision by the magistrate to issue the warrant. (See Pen. Code, §§ 1525-1528; Theodor, supra, 8 Cal.3d at pp. 85-87.) However, the magistrate may inquire further and require that the informant be produced or his identity disclosed in order to evaluate fully the existence of probable cause. (Keener, supra, 55 Cal.2d 714, 721-722.)

Magistrates and reviewing courts should view with some suspicion affidavits which disclose detailed, favorable information about the informant's credibility or reliability but treat similar adverse information lightly on the ground that further details might reveal the informant's identity.

for police informants generally. Thus the record fails to show that material facts bearing on informant's credibility and reliability were omitted from the affidavit.

Conclusion

Because we think that the affidavit was not substantially misleading, the warrant must stand unless Officer Matt acted recklessly or with intent to deceive when he omitted the facts at issue.

The order suppressing evidence and the judgment of dismissal are reversed. The cause is remanded for further hearings solely on the issue whether facts were excluded from the affidavit recklessly or with the specific intent of misleading the magistrate.

NEWMAN, J.

WE CONCUR:

TOBRINER, J.
MOSK, J.
RICHARDSON, J.
MANUEL, J.

C O P Y

PEOPLE v. KURLAND

Crim. 21023

CONCURRING OPINION BY CLARK, J.

I concur in the judgment and opinion of the court except insofar as it reaffirms the holding of People v. Cook (1978) 22 Cal.3d 67--that evidence obtained pursuant to a warrant issued in reliance on an affidavit containing deliberately false statements of fact must be excluded regardless of the effect of those statements on probable cause. I continue to believe the appropriate remedy in such a case is for the judge conducting the Theodor[1/] hearing to entirely reweigh the affiant's credibility if he is found to have lied in part. (22 Cal.3d at p. 101 (Clark, J., dis.).)

CLARK, J.

1/ Theodor v. Superior Court (1972) 8 Cal.3d 77.

C O P Y

PEOPLE v. KURLAND

Crim. 21023

DISSENTING OPINION BY BIRD, C.J.

I dissent. When the police have withheld adverse information which might have influenced a neutral and detached magistrate's decision to issue a warrant, the warrant should be quashed. This result should follow regardless of the motive which led the police to omit the information.[1/]

1/ Where the omitted adverse facts are merely cumulative, the warrant should stand. While this exception to the rule of exclusion might encourage law enforcement personnel to substitute their assessments of relevance for that of the magistrate, this will be at most a minor tendency. As the discussion below suggests, the magistrate's determination of probable cause

The majority's scheme for dealing with such omissions in affidavits for search warrants will result in a system in which relevant facts, i.e., those facts which might lead to a decision not to issue a warrant, will be withheld from the magistrate. This will "dilut[e] important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry." (Spinelli v. United States (1969) 393 U.S. 410, 419, fn. omitted.) This is neither good law nor good sense.

"The point of the Fourth Amendment, which often is not grasped by zealous

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1/ cont.

will not be suspect in such cases, despite the police's breach of their constitutional duty to inform the magistrate of all relevant adverse information known to them. Thus, suppression is not warranted as a means of enforcing the Fourth Amendment in this limited situation.

officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." (Johnson v. United States (1948) 333 U.S. 10, 13-14, fn. omitted.) In effect, the magistrate views, from a neutral and detached perspective, the body of information which is known to the police and which, in their eyes, supports a finding of probable cause and the issuance of a warrant. In this constitutionally cast role as factfinder, it is the province of the magistrate and not the police to determine the relevance and credibility of the information which law enforcement personnel have learned and the weight

of the various inferences which may reasonably be drawn from it. However, because of the "unavoidable circumstances that the application for the warrant is not an adversary proceeding" (People v. Cook (1978) 22 Cal.3d 67, 87, fn. 9), the magistrate must depend on the police to furnish the facts which form the basis for his determination as to whether he should issue a warrant.

When the police edit their information and withhold from the magistrate potentially adverse facts which they view as irrelevant or cumulative, then the police interfere with the magistrate's constitutional function. Although in such cases warrant applications may contain facts rather than conclusions, such affidavits are nonetheless conclusory in their selectivity. As a result, there is an increased risk that the privacy of the citizenry will be in-

vaded on the basis of the police's as opposed to the court's assessment of relevance and reasonableness.

Acknowledging the fundamental constitutional principle that "probable cause determinations [should] be made independently by neutral, fully informed judicial officers rather than by the police" (maj. opn., ante, at p.____, emphasis added [typed opn., at p. 5]), the majority properly find that an affiant bears a duty to disclose all "material" or "relevant" adverse facts in a warrant application. (Maj. opn., ante, at p.____ [typed opn., at p. 7].) However, the remedies which the majority prescribe for omissions of relevant facts from search warrant applications are not adequate to protect the principles at issue here.

When presented with a warrant application, the magistrate must "make in effect

two successive determinations: first he must satisfy himself that the facts are as the applicant states them to be, then he must consider whether those facts constitute probable cause for issuance of the warrant." (People v. Cook, supra, 22 Cal. 3d at p. 84, fn. omitted.) Under well-established rules of appellate review, the magistrate's factual findings, including any assessment of the affiant's credibility or the informant's reliability, are binding. Appellate courts may not substitute their judgments on such questions for that of the magistrate. (Id., at p. 84, citing Skelton v. Superior Court (1969) 1 Cal.3d 144, 154.)

Therefore, as this court explained in Cook, when a magistrate issues a warrant, the reviewing court must initially presume that "he found the affiant correctly believed in the truth of each of the factual

allegations of the affidavit." (People v. Cook, supra, 22 Cal.3d at p. 84.) However, if an affiant has intentionally supplied the magistrate with misstatements, a reviewing court may no longer excise the offending allegation and presume the magistrate to have found the remainder to be true. "If the magistrate had known the officer was deliberately lying to him in making certain of the allegations in the affidavit, he might well have disbelieved some or all of the remainder. His ignorance of this crucial fact undermines his determination of the officer's credibility, and the reviewing court can no longer rely on that determination for the facts necessary to test the magistrate's conclusion of probable cause. In short, although the court can excise the intentionally false allegations it cannot presume the remainder to be true. Lacking a reliable factual

basis in the affidavit, the court has no alternative under settled constitutional principles but to quash the warrant and exclude the products of the search." (Id., at pp. 86-87, fn. and citations omitted.)

The omission from the affidavit of facts relevant to an informant's reliability similarly affects the integrity of the factual findings underlying a magistrate's decision to issue a warrant. When the police omit information which might have led the magistrate to reject the warrant application, a reviewing court can no longer rely upon the magistrate's presumptive finding that the informant was reliable. The rationale which led this court in Cook to conclude that a warrant should be quashed when it is based on an affidavit containing deliberate misstatements by the affiant is applicable here and should lead to the same result. If

the magistrate had all the relevant adverse facts before him, he might well have found that the informant was not sufficiently reliable to support the issuance of the search warrant. The magistrate's ignorance of these facts undermines any determination of the informant's reliability. Thus, a reviewing court can no longer rely on that determination for the facts necessary to test the magistrate's conclusion of probable cause.

This court should adopt a rule that would encourage the police to keep the magistrate fully informed of the factual information necessary to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." (Aguilar v. Texas (1964) 378 U.S. 108, 111.) Indeed, the Constitution is better served if the police are overinclusive rather than underinclusive in the information

they provide the magistrate. Further, the police would be better served by a clear rule rather than the detailed taxonomy which the majority opinion advocates. (See generally In re Tony C (1978) 21 Cal. 3d 888, 902 (conc. and dis. opn. of Bird, C.J.).)

The guidelines suggested by the majority for distinguishing between those facts pertinent to an informant's reliability which are "immaterial" because they merely provide "predictable details" (maj. opn., ante, at p.____ [typed opn. at p. 23]) and those facts which "bear adversely on the informant's probable accuracy in the particular case" (id., at p.____, emphasis in original [typed opn. at p. 25]), will also be a source of confusion for the police who must conform their practices to the law. Isn't it better policy to announce a rule which simply cautions the police to

include rather than exclude facts when in doubt?

The effect of the majority's rule will be to encourage the police to withhold from the magistrate relevant facts adverse to the warrant application. If the police exclude relevant information in the reasonable but mistaken belief that it is immaterial as "predictable details of the informer's criminal past" (maj. opn., ante, at p.____ [typed opn., at p. 23]), there is no appellate review. What is even more disturbing is that if the police "unreasonably" withhold relevant information, the majority would apply the deferential "substantial evidence" test and uphold the warrant if a reasonable magistrate could have decided to issue a warrant if he had all the information before him. (Id., at pp.____-____, and fn. 6 [typed opn., at pp. 13-14].) Thus, the majority would

allow a warrant to stand even though the affidavit on which it was based was "substantially misleading" (id., at p.____, emphasis in original [typed opn. at p. 8]), unless the "unreasonably" withheld facts would have necessarily precluded a finding of probable cause.[2/] The legal fictions of

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2/ The majority opinion confuses the dissent's position on the issue of material omissions and the rule of the reviewing court.

The majority err when they set up a system which requires a reviewing court to defer to nonexistent findings of fact about the reliability of an informant. The problem with their thesis is that it is impossible for a reviewing court to know what inferences a magistrate would have drawn if he or she had been fully informed. The magistrate might have determined that probable cause existed even with the omitted facts. However, the magistrate might have decided that if all the facts had been included, the application for the warrant was not sufficient. In treating these two situations as if they were identical, the majority require a reviewing court to automatically uphold a warrant even though the magistrate would have found probable cause did not exist if all the facts had been fully disclosed.

such a rule are too far removed from reality to be indulged in at the expense of the Fourth Amendment. Under this scheme, there will never be any informed weighing of all the relevant facts known to the police by a neutral and detached magistrate, as the Constitutions of this nation and this state require.

The majority opinion does provide that a warrant must be quashed if the affiant "intentionally omits any fact for the purpose of deceiving the magistrate or recklessly disregards the accuracy and completeness of the affidavit . . . ." (Maj. opn., ante, at p. ____ [typed opn., at p. 17].) However, this is an illusory remedy since establishing proof of a specific intent to deceive the magistrate "would indeed be a difficult burden to sustain." (People v. Cook, supra, 22 Cal.3d at p. 91.) The difficulty of proof is compounded when

dealing with omissions rather than misstatements because the former are more readily susceptible to plausible justification.

The Constitution entrusts to an independent and fully informed magistrate the duty of determining when a citizen's right to privacy must reasonably yield to the state's interest in searching for evidence of a crime. In its decision today, the majority lost sight of the fundamental principle that this duty is not delegable to the police, regardless of how reasonably they might exercise it.

In the present case, I agree with the trial court's finding that "material information was not disclosed to the Court in the Affidavit which might have caused the Court to conclude differently in respect to the credibility of the confidential informant." Accordingly, I would affirm the

trial court's order suppressing the evidence and dismissing the action.

BIRD, C.J.

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Appellant, v. STUART LEE KURLAND, Defendant and Respondent.	5 Crim. No. 2890 (Super. Ct. No. 137154) O P I N I O N FILED APR 11 1979 KEVIN A. SWANSON, Clerk

APPEAL from a judgment of the Superior Court of Stanislaus County suppressing evidence and dismissing the action. Gerald V. Underwood, Judge. Reversed with directions.

Evelle J. Younger and George Deukmejian, Attorneys General, Jack R. Winkler, Chief Assistant Attorney General, Arnold O. Overoye, Assistant

Attorney General, Willard F. Jones and Jane Kirkland Fischer, Deputy Attorneys General, for Plaintiff and Appellant.

Robert R. Elledge for Defendant and Respondent.

This is the People's appeal from an order granting a motion to suppress (Pen. Code, §§ 1538.5) and dismissing the action.

Respondent, Stuart Lee Kurland, was charged with violating Health and Safety Code sections 11350 (possession of cocaine) and 11359 (possession of marijuana for sale). The charges were predicated on a search of Kurland's Discount Water Beds store conducted on April 6, 1976, pursuant to a warrant issued on that date. As a result of the search the officers discovered cocaine, over one and one-half pounds of marijuana and a .38 caliber revolver. The motion to suppress

was directed toward these items. The sole issue on appeal concerns the validity of the search warrant, particularly the affidavit of Officer Gerald Matt which relied upon information provided by a confidential reliable informant referred to as "Z."

The affidavit on its face meets the two-pronged test of Aguilar (Aguilar v. Texas (1964) 378 U.S. 108). With reference to the reliability of "Z," the affidavit related the details of two former cases wherein information was supplied by "Z" that had resulted in the arrests and convictions of persons for narcotics offenses. It further indicated that "Z" had never supplied any false information to the Stanislaus County Drug Enforcement Unit. It also set forth that "Z" is a former user of cocaine and is familiar with the way it is packaged.

Respondent's attack at the suppression hearing was directed toward revealing through an examination of Officer Matt the facts omitted from Matt's affidavit bearing upon the reliability of the confidential informant. (Theodor v. Superior Court (1972) 8 Cal.3d 77.) After a lengthy hearing extending over parts of several days, the court suppressed the evidence seized and dismissed the information, stating:

> "I make that on the grounds that material information was not disclosed to the Court in the Affidavit which might have caused the Court to conclude differently in respect to the credibility of the confidential informant. Those items are recited in the record, I will not repeat them at this particular time."

The clerk's transcript likewise shows that the case was dismissed because the motion to suppress was granted and the

parties have conceded that this was the basis of the dismissal.

The information which was omitted from the affidavit as developed through examination of Officer Matt at the hearing consisted of the following: "Z," the confidential informant, had a criminal record; "Z" had been convicted of a felony; Officer Matt had filed a criminal complaint against "Z" charging three counts; "Z" was on probation in 1974; Matt had a dozen contacts with "Z" in 1976 prior to the search and respondent's arrest; and Matt had discussed "Z's" cooperation with him as an informant.

During the course of the hearing the judge sustained objections to several questions on the ground the answers might tend to disclose the identity of the informant. One such question was directed toward the nature of the specific charge

against the informant in the 1974 complaint.

Near the end of the hearing Matt was asked by respondent's counsel whether he was one of the investigating officers in the 1974 case. The prosecution asserted the privilege that any answer would tend to reveal the identity of the confidential informant. After an in camera hearing the court was of the opinion that the answer would not tend to reveal the identity of the informant. However, the court did not order the question to be answered; the respondent did not renew his motion to dismiss on the ground the question should be answered. It is apparent from the record that the judge did not dismiss the cause on this ground. The order in context clearly indicates that the information disclosed during the in-camera hearing together with the other information above which was omitted from the affidavit was

determined to be material on the issue of reliability of the informant and should have been revealed in the affidavit to the judge at the time of issuance of the warrant. Because that information was not included in the affidavit, the court ordered the evidence seized pursuant to the warrant to be suppressed. (Theodor v. Superior Court, supra, 8 Cal.3d 77; Morris v. Superior Court (1976) 57 Cal.App.3d 521; People v. Barger (1974) 40 Cal.App.3d 662, 668-669.)

The only attack leveled by the appellant against the court's suppression and dismissal order is that the evidence omitted was not material to the issue of reliability and, unlike Morris, the omission of the information, though intentional, did not involve deliberate bad faith or an intent to deceive or mislead the magistrate. Rather, the appellant urges that the omis-

sion was for a legitimate purpose.

The test of materiality is whether facts " . . . withheld from the affidavit were material and relevant, to the extent that it can be said, fairly, that the magistrate's inference-drawing process was interfered with, substantially." (Morris v. Superior Court, supra, 57 Cal.App.3d at p. 524; see People v. Neusom (1977) 76 Cal. App.3d 534, 540.) The trial judge, who was also the judge who issued the warrant, expressly found (citing Morris), that the omission of the recited information from the affidavit did result in unduly and substantially interfering with the judge's inference-drawing process. The trial court's determination that material information was omitted constitutes a resolution of a factual question which is binding upon the appellate court.

> "A proceeding under section 1538.5 to suppress evidence is a full hearing on the issues before the superior court sitting as finder of fact. [Citations.] The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings - whether express or implied - must be upheld if supported by substantial evidence. [Citations.]" (People v. Superior Court (Keithley) (1975) 13 Cal.3d 406, 410.)

We cannot say that as a matter of law the inference-drawing process was not interfered with by the omission of the facts which have been heretofore set forth.

It is true that the automatic suppression rule enunciated in Morris is limited by its facts and language to cases where the omission is not only intentional but deliberately accomplished with the intent to deceive or mislead the magistrate. In the case at bench, while the information

was intentionally omitted, the officer-affiant reasonably believed in good faith that he was justified in doing so to maintain the confidentiality of the informant's identity.[1/] In People v. Barger, supra, 40 Cal.App.3d at p. 669, the court made the determination as to the appropriate standard to be applied in a case involving the omission of material facts from an affidavit by examining whether the affiant acted

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1/ Evidence Code section 1042, subdivision (b), states:

> "(b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it."

See also People v. Flemmings (1973) 34 Cal.App.3d 63, 68 ("a defendant is not entitled to a disclosure of the identity of an informant whose testimony would be material only on the issue of probable cause to arrest").

In the case at bench the omission of the facts was not negligent in the sense that the omission resulted from lack of proper investigation or carelessness in reciting the facts. They were intentionally omitted in the good faith and reasonable belief that the omission was essential to protect the identity of the confidential informant - a legitimate and statutorily recognized object of law enforcement procedures. Moreover, whether certain facts would or would not tend to lead to the discovery of the identity of an informant is properly a judicial question which, as in the case at bench, can only be determined by a judicial officer after a full hearing. Assuming the officer is acting in good faith and under the reasonable belief that the information is within the confidential informant privilege, to cast upon an officer the burden of making such a determina-

reasonably in making the omission. The court concluded that if the omission of the information is negligent the omitted information should be placed in the affidavit and probable cause tested on the total facts which should have been available to the magistrate. The rule of reasonableness also is evident in cases involving erroneous inclusion of information. (See People v. Cook (1978) 22 Cal. 3d 67 [statements included in an affidavit not classified as deliberate misstatements known to be false at the time they are made]; Theodor v. Superior Court, supra, 8 Cal.3d at pp. 98-102.) Both Cook and Theodor recognize that the negligent inclusion of erroneous information does not result in automatic invalidation of the warrant but that the erroneous information should be excised and probable cause tested from the remaining information.

tion at the risk of invalidating the warrant should the officer guess wrong asks too much from law enforcement and exacts too great a price from society. On the other hand, we recognize that the information omitted may be critical in determining the reliability of the informant and consequent validity of the warrant. We think both interests will be adequately served and the balance properly struck if the procedure outlined in the case of negligently omitted information is followed. (Cf. People v. Hitch (1974) 12 Cal.3d 641, 650-652.) To iterate, that procedure would require the judge to add the omitted facts to the affidavit and test probable cause in the light of the additional information.

In the case at bench the court in its dismissal order cited Morris and then stated, "I make that on the grounds that

material information was not disclosed to the Court in the Affidavit which might have caused the Court to conclude differently in respect to the credibility of the confidential informant." (Emphasis added.) From this it would appear that the court applied the automatic invalidation rule of Morris. We cannot tell what the court would have concluded had it simply added the omitted facts to the affidavit and tested probable cause in the light of the additional information in accordance with the rule we have announced. Because the court did not follow the proper rule, we have no alternative but to reverse the order suppressing the evidence and remand the action to the trial court with directions to follow the procedure set forth herein.

We think it appropriate to make one further observation. While much of the

lengthy hearing in the trial court was devoted to the problem of whether Officer Matt should have been required to answer questions which might tend to disclose the identity of the informant, we note that neither party on this appeal has raised any issue that the trial judge committed error in requiring or not requiring Officer Matt to answer any of the questions asked of him. We therefore are not called upon to discuss the difficult position of a trial judge who is caught in the vortex of tension between preserving the confidentiality of an informant on the issue of probable cause (see fn. 1, ante) and the recognized right in a Theodor hearing to cross-examine an affiant with regard to the reliability of the informant. (See Theodor v. Superior Court, supra, 8 Cal.3d at pp. 101-103; People v. Cook, supra, 22 Cal.3d at p. 74; Morris v. Superior Court, supra,

57 Cal.App. 3d at pp. 525-526.) Presumably the parties are satisfied that the court properly exercised its discretion in striking this balance under the provisions of Evidence Code section 1042, subdivision (c). (See Parsley v. Superior Court (1973) 9 Cal.3d 934, 941-942.)

The order suppressing the evidence and dismissing the action is reversed. The action is remanded to the trial court with directions to add the omitted facts to the affidavit, test probable cause in the light of the additional information and enter an appropriate order thereon.

CERTIFIED FOR PUBLICATION

BROWN (GEO. A.), P.J.

WE CONCUR:

FRANSON, J.

HOPPER, J.

APPENDIX C

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Appellant, v. STUART LEE KURLAND, Defendant and Respondent.	5 Crim. No. 2890 MODIFICATION OF OPINION ON DENIAL OF REHEARING COURT OF APPEAL FIFTH APPELLATE DISTRICT FILED MAY 16 1979 KEVIN A. SWANSON, Clerk

[Modification of opinion (____Cal.App.3d___, ____Cal.Rptr.____) on denial of Petition for Rehearing.]

The opinion heretofore filed on April 19, 1979, is modified as follows:

1. On page 5 the last paragraph should be deleted and following language substituted therefor:

> We hold that the automatic suppression rule enunciated in Morris is limited to cases where the omission is not only intentional but deliberately accomplished with the intent to deceive or mislead the magistrate. In the case at bench, while the information was intentionally omitted, the officer-affiant could have reasonably believed in good faith that he

2. On page 7, lines 3 and 4, which read "proper investigation or carelessness in reciting the facts. They were intentionally omitted in the good faith and reasonable" should read as follows:

> proper investigation or carelessness in reciting the facts. However, they may have been intentionally omitted in the good faith and reasonable

3. On page 7, lines 7 and 8, which read "recognized object of law enforcement procedures. Moreover, whether certain facts would or would not tend to lead to the" should read as follows:

> recognized object of law enforcement procedures. Whether the inclusion of certain facts in an

affidavit would or would not tend to lead to the

4. On page 8, line 5 through the remainder of the first paragraph should be striken and the following language substituted therefor:

> added.) At the time the hearing below was held, Morris v. Superior Court (1976) 57 Cal.App.3d 521 required that the existence of these facts, standing alone, result in the invalidation of the search warrant. From the trial court's statement and the record as a whole it is apparent that the judge applied the automatic suppression rule of Morris without feeling it necessary to consider whether the affiant acted in bad faith in painting a distorted picture with which to deceive the magistrate. In a 1538.5 proceeding, the failure of the fact finder to pass upon an issue prevents this court from inferring that implied findings were made as to that issue. (People v. Superior Court (1970) 9 Cal.App.3d 203, 210-211.) We cannot tell what the court would have concluded had it determined that the affiant's omission, although unjustified, was reasonable and the court proceeded to simply add the omitted facts to the affidavit and test probable cause in

the light of the additional information in accordance with the rule we have announced. Because the court did not follow the proper rule, we have no alternative but to reverse the order suppressing the evidence and remand the action to the trial court with directions to follow the procedure set forth herein.

Petitioner's petition for rehearing is denied.

Dated: MAY 16 1979

BROWN (GEO.A.), P.J.

We concur:

FRANSON, J.

HOPPER, J.

APPENDIX D

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

CRIM. No. 21023

THE PEOPLE, PLAINTIFF AND APPELLANT,	)	
vs.	)	Appeal
STUART LEE KURLAND, DEFENDANT AND RESPONDENT.	)	County STANISLAUS
	)	Superior Court No. 137154

The above-entitled cause having been heretofore fully argues, and submitted,
IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the ORDER SUPPRESSING EVIDENCE AND THE JUDGMENT OF DISMISSAL
of the Superior Court OF THE County of STANISLAUS in the above-entitled cause, ARE hereby REVERSED. THE CAUSE IS REMANDED FOR FURTHER HEARINGS SOLELY ON THE ISSUE WHETHER FACTS WERE EXCLUDED FROM THE AFFIDAVIT RECKLESSLY OR WITH THE SPECIFIC

INTENT OF MISLEADING THE MAGISTRATE.

I, LAURENCE P. GILL, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 30th day of OCTOBER, 1980.

Witness my hand and the seal of the Court, this 18TH day of DECEMBER, 1980.

LAURENCE P. GILL
Clerk

By_____
Deputy
GLENN E. SCHNEIDER

APPENDIX E

Crim. No. 31023

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

KURLAND

SUPREME COURT
FILED
NOV 26 1980
LAURENCE P. GILL, Clerk

The time for granting or denying a rehearing in the above cause is hereby extended to and including December 29, 1980 or the date upon which a rehearing is either granted or denied.

Bird
Chief Justice

APPENDIX F

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

San Francisco, California 94102

DEC 17 1980

I have this day filed Order

REHEARING DENIED

In re: Crim. No. 21023

People

vs.

Kurland

Respectfully,

Clerk

AFFIDAVIT OF SERVICE

I, YVONNE BOWLING, a stenographer in the office of ROBERT R. ELLEDGE, A Professional Corporation, the attorney of record for STUART LEE KURLAND, Petitioner herein, depose and say that on the 13th day of March, 1981, I served three copies of the foregoing PETITION FOR A WRIT OF CERTIORARI on the several parties thereto as follows:

On the People of the State of California by mailing three copies in a duly addressed envelope with postage prepaid, to George Deukmejian, Attorney General, State of California, 555 Capitol Mall, Sacramento, California 95814.

All parties required to be served have been served.

Yvonne Bowling
YVONNE BOWLING

On March 13, 1981, before me, the undersigned, a Notary Public in and for the State of California, personally appeared YVONNE BOWLING, known to me, to be the person whose name is subscribed to this instrument, and acknowledged to me that she executed the same.

WITNESS my hand and official seal.

Barbara R. Wissman
Notary Public